

XO Communications, Inc.



December 14, 2004

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, DC 20554

Tel 703.647.2000

RE: In the Matter of Unbundled Access to Network Elements; WC Docket No. 04-313; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338

Submitted at the Request of FCC Staff

Dear Ms. Dortch:

I am writing in response to a specific request from Jessica Rosenworcel of Commissioner Capps' office. Ms. Rosenworcel asked for additional information regarding whether the experience of XO Communications, Inc. ("XO") is similar to that described in an ex parte submission dated December 1, 2004 and filed by Time Warner Telecom, Inc. ("TWTC").¹ Pursuant to 47 C.F.R. sec.1.1204(a)(10), this submission is exempt from the sunshine period prohibited against ex parte presentations.

In its filing, TWTC makes clear that it is *almost never economic* for competitive LECs ("CLECs") to construct their own loop facilities to a building in order to provide DS1-level connectivity (TWTC Letter, p. 1). However, TWTC goes on to state that it is sometimes economic for CLECs to self deploy fiber loops to provide DS3 - level connectivity, and that CLEC decisions to build DS3-level loop facilities are driven by the aggregate demand for telecommunication services within a particular building to be served, -- not the size of the incumbent LEC ("ILEC") serving wire center to which the building is connected. As is explained hereafter, XO generally agrees with the TWTC analysis, but believes that it is critical that the TWTC letter not be read more expansively than the company clearly intended.

1. XO, like TWTC, Cannot and Does Not Build Loop Facilities to Provide DS1-Level Connectivity.

TWTC states that it is not economic for CLECs to construct loop facilities to a building unless it can reasonably expect to earn revenue from that specific location exceeding certain revenue thresholds included in the TWTC Letter. (TWTC Letter, p. 1) The company then states unequivocally that "*competitors cannot hope to earn this much revenue from even multiple DS1-level customers in a building*". (*Id.*, footnote omitted and emphasis added). TWTC explains that "[l]argely because of the relatively limited

¹ Ex parte letter of Thomas Jones of Willkie Farr & Gallagher, LLP to Ms. Marlene Dortch on behalf of TWTC, December 1, 2004 ("TWTC Letter").

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revenue opportunities associated with services that rely on DS1-level connectivity, TWTC must rely on incumbent LEC loop facilities....” (*Id.*, pp 1-2). The experience of XO, easily the nation’s largest CLEC, is almost completely the same. As was explained by Mr. Wil Tirado, XO’s Director of Technology and Architecture, in his declaration filed earlier in this docket, “[d]ue to the extraordinary cost of constructing laterals, XO’s current policy is not to add a building to its network unless customer demand at that location exceeds at least 3 DS3s of capacity.”² Mr. Tirado provided a specific company cash flow analysis that conclusively demonstrated that loop “builds are not financially justified until at least 3 DS3s of capacity are under contract,” (*Id.*), and summarized that “it almost never is economic for XO to construct its own wireline DS-1 loop facilities.” (*Id.*, para. 21) For your convenience, we have included Mr. Tirado’s cash flow analysis as Attachment A hereto, and a diagram depicting the costs incurred in constructing loop facilities as Attachment B hereto.

2. The Decision to Construct OcN or DS3-Level Loop Facilities is Governed by the Level of Customer Demand in a Building.

With respect to the decision to build very high capacity OcN or Ds3-level loop facilities, XO concurs with TWTC that the decision to construct such facilities is driven by customer demand within a building and *not* by the size of the serving wire center of that building. As was explained more fully in an ex parte submission that we made herein on December 8, 2003³, XO uses a careful screening process to decide whether the investment in loop construction is justified on a case-by-case.⁴ The customer revenue commitment at the building in question must exceed the construction costs and the costs of the electronic equipment to be deployed in order for it to be economically rational for XO to build the loop. Because of the significant upfront costs of building loops⁵, no decision to build a new loop to a building is made until a signed customer contract is in hand to insure that XO will be able to recoup its costs. XO’s current policy is not to add a building to its network unless customer demand at that location exceeds at least 3 DS3s of capacity⁶. The point is that our decision to build derives from actual customer demand for our services at a specific location and the size of the corresponding ILEC serving wire center is simply relevant.

3. The Fact that CLECs Self Provision Fiber to a Building is Not Evidence that They can Provide DS1-level Connectivity to All Customers in the Building.

² Declaration of Wil Tirado of XO, para. 20, attached to the Initial Comments of the Loop-Transport Coalition (filed October 4, 2004) (“Tirado Declaration”)

³ Ex parte letter of Brad Mutscheiknaus of Kelley Drye & Warren, LLP to Ms. Marlene Dortch on behalf of XO Communications, Inc., December 8, 2004 (XO DS3 Letter).

⁴ Exhibit 2 to the Emergency Petition For Expedited Determination That Competitive Local Exchange Carriers Are Impaired Without DS1 UNE Loops, filed by XO on September 29, 2004 in WC Docket No. 04-313 and CC Docket No. 01-338 at 6.

⁵ *Id.*

⁶ Tirado Declaration, para. 20.

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It is extremely important not to make the erroneous leap of faith that CLEC OcN-level fiber facilities to a building can be used to deliver DS3- or DS1-level connectivity to all (or even most) customers at that location. The notion that self-provisioning of fiber to a building by a CLEC is material evidence regarding non-impairment to that building regarding DS3 and DS1 loops, is unfounded. The simple fact that a CLEC self-provisions to a building to serve certain customers within a building is not evidence that it could self-provision to serve *any customer* in the building *at any capacity*. As an initial matter, if a carrier is serving a building at an OCn level, it could not simply turn around and begin providing service at a DS3 or DS1 level to customers in the building. Significant facilities modifications would be required.⁷¹ Similarly, even in those limited cases where a carrier might be serving a customer in the building at a DS3 level (or DS1 level), modifications and additional investments would be needed before it could begin to serve a customer at a DS1 (or DS3) level. For instance, XO has lit several buildings in order to provide high capacity wavelength services. To support these offerings, XO has installed electronics specific to delivering that product and which are technically incapable of delivering DS1 services. In order to deliver DS1 services to these building, at the very least, XO would have to deploy additional electronics, if not additional fiber and/or obtain the necessary rights and build in building distribution.

Above and beyond the problem that providing fiber to a building does not necessarily, and in most cases today for CLECs does *not*, translate into the capability of providing DS3 or DS1 level capacity to that building, a CLEC that serves one customer within a building does not typically have the right to serve every tenant within the building. The extent to which a carrier can serve tenants within a building is controlled by the building owner. In most cases, ILECs, because of their dominant position in the local market that persists today almost always have access to the *entire* building, often at very little or at no cost.⁸¹ Competitors, on the other hand, will most commonly be granted access by building owners only to particular customers on particular floors, often at exorbitant rates.⁹¹ If a competing provider then wants to serve additional tenants or floors within the building, it must reenter negotiations with the buildings owners for additional

⁷¹ See, e.g., WC Docket No. 04-313, CC Docket No. 01-338, Loop and Transport CLEC Coalition Comments, Declaration of Warren Brasselle, Talk America Inc. (dated October 1, 2004) (explaining that in order to offer a wholesale DS-3 service to other CLECs, "a carrier must first purchase, install and operate the additional equipment (i.e., multiplexers and de-multiplexers) required to channelize a DS-3 circuit within a larger OCn circuit, and deliver it on the DS-3 interface.") ("Braselle Declaration").

⁸¹ See WC Docket No. 04-313, CC Docket No. 01-338, Reply Declaration of Ben F. Wilson, MCI, Inc., ¶¶ 3, 11 ("Wilson Reply Declaration"); WC Docket No. 04-313, CC Docket No. 01-338, Declaration of Wil Tirado, XO Communications, ¶ 2 (November 18, 2004) ("Tirado November 2004 Declaration").

⁹¹ See WC Docket No. 04-313, CC Docket No. 01-338, Declaration of Anthony Fea and Anthony Giovannucci, AT&T Corp., ¶¶ 27-29, 42 (October 4, 2004) ("Fea/Giovannucci Declaration"). ALTS Comments at 63 (discussing "fiber-to-floor" arrangements); Sprint Comments at 45-46 (noting that many of the vendors in Sprint's database are able to serve only a single customer in a building); Tirado November 2004 Declaration, ¶ 7. In other situations, a building owner may demand that a CLEC serve the entire building or a complex of buildings when the business case to complete such a build-out is not present. See, e.g., Wilson Reply Declaration, ¶ 9.

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rights of access, resulting in additional fees and charges.^{10/} Often, negotiations with building owners lead to lengthy delays in being able to serve a customer and the customer may be lost even before the negotiations with the building owner have been completed, rendering them futile.^{11/} Because building owners are not constrained by the reasonableness and anti-discrimination provisions in the Communications Act, they are free to extract significant amounts from competitors for access to tenants within their buildings.^{12/} As a result, competitors typically will only serve tenants in the building for which they can make the appropriate business case.^{13/} For this reason, evidence that a CLEC is serving a building has no correlation with an ability to serve every tenant within a building, or even any additional tenants. On this basis alone, the adoption of a self-provisioning trigger for DS3 and DS1 loops is unfounded.

4. The Fact that a CLEC is Self-Providing Loops to a Building Does Not Mean that Other CLECs Could Do So.

As noted above, the fact that a CLEC is self-provisioning fiber loops to a building does not mean that it could self-provision DS3 or DS1 loops to any tenant in the building. By the same token, the fact that one CLEC self-provides OCn, or even DS3 and DS1, loops to some customers in a building is no evidence that another CLEC could economically self-provide DS3 or DS1 loops to that building with its own facilities. Many obstacles stand in the way of the second CLEC self-provisioning to customers within the building. As an initial matter, the second CLEC would have to negotiate with the building owner access rights within the building to the customers it wishes to serve which the building owner has no obligation to agree to, or may agree to only subject to onerous fees or other conditions. In addition, the second CLEC would have to negotiate terms to bring its facilities to the building with both private and municipal rights-of-way owners.^{14/} These negotiations may lead to long delays, may not be successful – there

^{10/} See WC Docket No. 04-313, CC Docket Nos. 01-338, 96-98 and 98-147, *Ex Parte* Letter from Smart Buildings Policy Project, at 3 (dated November 19, 2004); Tirado November 2004 Declaration ¶ 6

^{11/} See Wilson Reply Declaration ¶¶ 13-15; WC Docket No. 04-313, CC Docket No. 01-338, Reply Declaration of Anthony Giovannucci, AT&T Corp., ¶¶ 5-6, and 9-11 (dated October 18, 2004) ("Giovannucci Reply Declaration"); Tirado November 2004 Declaration ¶¶ 3, 5, and 8.

^{12/} See Giovannucci Reply Declaration ¶ 10-12; Tirado November 2004 Declaration ¶ 9; Wilson Reply Declaration ¶¶ 3-9. See also *In the Matter of Competitive Networks in Local Telecommunications Markets*, *Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.400 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas designed to Provide Fixed Wireless Services*, WT Docket No. 99-217, CC Docket Nos. 96-98 and 88-57, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983, 22992 (2000).

^{13/} See e.g., WC Docket No. 04-313, CC Docket No. 01-338, AT&T Corp. Comments, Declaration of John D'Apolito and Milford Stanley, AT&T Corp., ¶ 25 (October 4, 2004) ("[T]he high sensitivity of business cases to the length and cost of outside plant highlights the incumbents' enormous advantages that result from their widely deployed fiber facilities. . . . [E]xperience shows that CLEC construction is often either uneconomic (i.e., cannot be cost-justified) or impractical (i.e., is barred because of building access or customer refusals to roll existing circuits.").

^{14/} See Tirado Declaration ¶ 8 (noting that "CLECs have no absolute right to build into the complexes at which its customers reside. [CLECs] must negotiate private Rights-of-Way ("ROW") licenses and

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may simply be no available conduit or pole space available – or may result in or extraneous additional uneconomic burdens.¹⁵⁷ Further, in comparison with the first CLEC, the network architecture of the second CLEC, *e.g.*, the location of its access points or its switching facilities, may be such that self-provisioning to the building may not be cost-justified for the second CLEC.¹⁶⁷ The additional costs and delays associated with self-provisioning mandate that there be a strong business case to do so, typically supported by a geographic concentration of customers. The potential revenues from a single or small number of DS1 or DS3 level of customers typically does not justify the expenditures related to the build-out.¹⁷⁷ This is especially true for DS1 services, given that DS1 customers, as a whole, have demonstrated a greater tendency to switch providers making the stream of revenue from self-provisioning more uncertain and risky.¹⁸⁷ In the absence of conditions supporting a strong business case, for self-provisioning DS1 and DS3 loops, the only economic alternative is relying upon the ILECs or, if they exist, wholesalers.

5. The Fact that a CLEC Self-Provisions Fiber Loops to a Building Does Not Mean that It Is Capable of Acting as a Wholesaler of DS3 or DS1 Loops.

A self-provisioning trigger for loops is also inappropriate because the fact that a CLEC self-provisions loops to serve certain customers within a building is not evidence that it could provide loop alternatives to other CLECs to serve customers in the building. There is, in the first instance, the continuing problem, as discussed above, that the CLEC that is self-provisioning may have no capability to provide DS3 or DS1 loops even to itself, let alone other carriers. In addition, even assuming *arguendo* that it had the ability to provide DS3 or DS1 loops to the building, there is the likely scenario, also discussed

building access agreements, which may or may not be available at economic prices and depending on the location of the building.”); WC Docket No. 04-313, Loop and Transport CLEC Coalition Comments, Declaration of Anthony Abate, SNIP LINK, LLC (dated October 1, 2004) (noting that a principal barrier to constructing a fiber ring is the need to obtain rights-of-way and pole attachments from three separate governmental entities, a requirement from which Verizon is exempt.).

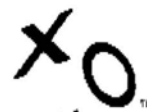
¹⁵⁷ See ALTS Comments at 65 (citing the Bates-White Report) (“The costs of deploying fiber varies significantly depending on whether a firm must deploy new underground installations, use poles or use existing conduits); WC Docket No. 04-313, CC Docket No. 01-338, Batelaan Declaration ¶ 5 (noting that intransigent landlords commonly demand high fees or restrict the extent of fiber deployment within a building); Sprint Comments at 43-44 (noting that “[i]n addition to the time necessary to build [facilities], competing carriers face delays securing ROW access and obtaining permits, as well as delays stemming from municipal “franchise” conditions, construction moratoriums, preservation constraints, even endangered species issues.”).

¹⁶⁷ See Fea/Giovannucci Declaration ¶ 32 (“For any given carrier, whether deployment is economic depends entirely on how much traffic that specific carrier has on the point-to-point route in question, how close together the two points are (*i.e.*, how much new outside plant is required) and what alternatives exist to construction on that route. The fact that another carrier has built a facility to a given LSO has nothing whatsoever to do with whether AT&T can economically build a transmission facility between the same points.”).

¹⁷⁷ See Johnson Declaration ¶ 7; WC Docket No. 04-313, ATX *et al.* Comments, Declaration of Steven A. Wengert, BayRing Communications, ¶ 10 (dated October 4, 2004).

¹⁸⁷ See Triennial Review Order at ¶ 325; Johnson Declaration ¶ 7; Sprint Comments at 43.

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above, that it will have access only to certain tenants, floors, or spaces, which may not be the locations within the building that the other CLEC would like to serve. Assuming for the sake of argument, however, that these two obstacles have been overcome significant problems remain.

First, there is no reason to presume that the self-provisioning CLEC is equipped to provide wholesale service to other CLECs. Operation as a wholesale provider of loops requires a different business model than retail and significant additional investments that many CLECs have not made in the form of backroom capabilities, OSS systems, multiplexing, marketing, product development, and wholesale customer support.^{19/} The Commission should not assume that every CLEC that self-provisions fiber to one or more of its own retail customers in a building intends to enter into this new line of business as a wholesaler. KMC, for example, in designing its network has stated in this docket that it did not contemplate a wholesale loop service offering and is not operationally ready to provide wholesale loops to other carriers.^{20/} Second, because the record evidence demonstrates that the ILECs have locked up so much of the special access market through long-term contracts, the provision of wholesale service by CLECs may not be economic so as to justify the investments needed to become a wholesaler. Third, loops are not end-to-end services, and it is not clear that CLECs have any obligations to provide loops to other carriers for resale purposes. Fourth, a CLEC's self-provisioned loops may simply tie into its fiber network rather than into a nearby ILEC central office or convenient carrier hotel, which competitive carriers would require of a wholesaler. Accordingly, if a CLEC wanted to access another CLEC's loop facilities, it might have to build its own links or entrance facilities to the CLEC wholesaler. Alternatively, it may be necessary for the CLECs to be collocated in the same ILEC central office and to establish cross-connects, which may not be cost-justified on the account of one or a small number of customers in a building. The need to establish such cross-connects within the ILEC space may also lead to delays and obstacles which result in lost customers.^{21/} Given the many and numerous obstacles to a CLEC serving as a wholesaler, the Commission should not use the simple fact that a CLEC self-provides some fiber to a building as evidence that a wholesaler exists within that building for other CLECs to use as an alternative to ILEC-provided loops.

^{19/} Indeed, Mike Duke of KMC notes that in order for KMC to offer wholesale loops to other carriers, "it would require the redesign and upgrade of the existing transport network. As with other operational requirements necessary to upgrade KMC's network to a wholesale interoffice transport network, deployment of a wholesale loop offering would also require increased capacity requirements on both nodes on each ring and expansion of space and power to accommodate additional electronics in the ILEC central office collocations, or at a customer building." Duke Declaration ¶ 23. *See also id.* ¶¶ 23-25 (noting that the provision of wholesale loops would encounter space and support constraints and would require expanded (and costly) network support systems including customer collocations, provisioning and billing systems and new processes and systems).

^{20/} *See id.* ¶ 21.

^{21/} *See* Fea/Giovannucci Declaration ¶ 22.

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6. Local Telecommunications Duopolies Are Not Sufficient, Competitive Markets.

Finally, as a matter of policy, abolishing loop UNEs where one or two CLECs have deployed would not be a sound decision by the FCC. It is unwise to adopt unbundling rules that allow for, at best, a wireline duopoly comprised of an ILEC and one or two CLECs.

The Commission itself has found that the existence of only a few service suppliers does provide a sufficient competitive effect. For example, the FCC held in place the prohibition on cross-ownership of CMRS companies in large MSAs through 2001 due to concerns surrounding “cellular duopoly conditions.”^{22/} The Commission had retained that rule for 10 years “[i]n order to guarantee the competitive nature of the cellular industry and to foster the development of competing systems.”^{23/} For similar reasons, the FCC rejected the proposed Hughes-EchoStar merger, noting that “courts have generally condemned mergers that result in duopoly.”^{24/} More recently, the FCC re-affirmed its local ownership rule for radio stations, finding that “both economic theory and empirical studies suggest that a market that has five or more relatively equally sized firms” adequately ensures a competitive market.^{25/} This reasoning applies equally to local wireline telecommunications competition. The presence of one or two CLECs in a building — even if the CLECs serve the entire building — at most provides a duopoly for its tenants. This environment does not sufficiently ensure that tenants have a meaningful choice of service, nor does it place adequate price pressure on the resident ILEC.

To summarize, XO agrees with TWTC that the decision of CLECs to self-provision loops is driven by demand for telecommunications services within specific buildings and not within the general serving area of ILEC central offices. However, even where building level demand justifies the construction of OcN or DS3 – level loop facilities by one CLEC, the existence of such facilities provides little evidence of the ability other CLECs to build facilities into the same building, and virtually no indication of the feasibility of deploying DS-1 level connectivity to occupants of such buildings. Thus, as XO and seven other facilities based CLECs stated in a joint submission made in this docket on December 8, 2004,^{26/} if the Commission establishes a test for determining

^{22/} 2000 Biennial Regulatory Review, *Spectrum Aggregation Limits for Commercial Mobile Radio Services*, WT Docket No. 01-14, 16 FCC Rcd. 22, 668 ¶ 6 (2001).

^{23/} *Id.* ¶ 16 (quoting *Cellular First Report and Order*, 6 FCC Rcd. 6185, 6628 ¶ 103 (1991)).

^{24/} *Application of EchoStar Commun. Corp. et al., Transferors, and EchoStar Commun. Corp., Transferee*, CS Docket No. 01-348, Hearing Designation Order, FCC 02-284 ¶ 100 (rel. Oct. 18, 2002).

^{25/} 2002 Biennial Regulatory Review – *Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13620, 13731 ¶ 289 (2003), *aff’d in part, rev’d in part*, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

^{26/} Joint letter to Marlene Dortch of Broadview Networks, Covad Communications, CBeyond Communications, Erduelan Telecom, KMC Telecom, Norox Communications, XO Communications

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CLEC high capacity loop impairment, the only rational choice would be a test for the existence of actual wholesale loop alternatives within a building.

Respectfully submitted,



Heather B. Gold
Senior Vice President,
Government Relations

Cc: Jessica Rosenworcel



Attachment A

Cash Flow Analysis (24 Month Present Values)

Number of DS3 Installs in Month 1 (no DS3 installs in Months 2 through 24)

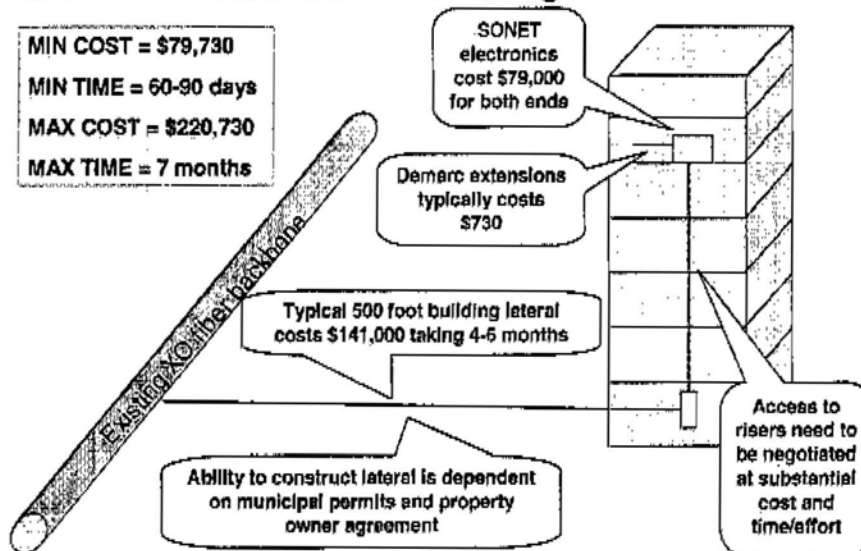
		1.0	1.5	2.0	2.5	3.0
Revenue per DS3 Per Month	\$1,000	(\$204,900)	(\$197,100)	(\$189,300)	(\$181,500)	(\$173,600)
	\$2,000	(\$188,300)	(\$172,200)	(\$156,100)	(\$140,000)	(\$123,900)
	\$3,000	(\$171,700)	(\$147,300)	(\$123,000)	(\$98,600)	(\$74,200)
	\$4,000	(\$155,200)	(\$122,500)	(\$89,800)	(\$57,100)	(\$24,500)
	\$5,000	(\$138,600)	(\$97,600)	(\$56,700)	(\$15,700)	\$25,300
	\$6,000	(\$122,000)	(\$72,800)	(\$23,500)	\$25,700	\$75,000

- ❖ \$220,000 of fiber cost (based on the average length of XO's laterals -- 500')
- ❖ NPV over 24 months



ATTACHMENT B

What Does it Take to Add a Building to XO's fiber backbone?



Carriers cannot afford to build to customer premises [\$141,000 (fiber build)], even in building where fiber is present [\$79,000 (electronics) + \$730 (demarc)]